No. 84-334

Office-Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

PEAT, MARWICK, MITCHELL & CO.,

Petitioner,

--against--

PETER MOSESIAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM S. LERACH
(Counsel of Record)
KEITH F. PARK
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

MELVYN I. WEISS
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, New York 10119
Telephone: (212) 594-5300

Counsel for Respondent

October 4, 1984

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	2
I. THE NINTH CIRCUIT'S DECISION THAT THE STATUTE OF LIMITATIONS HAD NOT RUN ON THIS SHAREHOLDERS' CLASS ACTION WAS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR COURTS OF APPEAL	2
II. PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE STATUTE OF LIMITATION ISSUE	6
III. THE NINTH CIRCUIT AND THE DISTRICT COURT APPLIED THE CORRECT LIMITATIONS PERIOD -- A PERIOD WHICH SHOULD BE CHANGED, IF AT ALL, BY CONGRESS	9
IV. CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301 (9th Cir. 1982) 4

Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967) 7

Beacon Theatres v. Westover, 359 U.S. 500 (1959) 7

Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983) 5

Briskin v. Ernst & Ernst, 589 F.2d 1363 (9th Cir. 1978) 5,7

Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978)..... 5

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983) 9,10

deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1970) 7

Dimick v. Schiedt, 293 U.S. 474 (1935) 7

Dixon v. Northwestern Nat. Bank, 297 F.Supp. 485 (D. Minn. 1969) 7

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 9

Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981) 5

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 9,10

Holmberg v. Armbrecht, 327 U.S. 392 (1946)..... 4

Jacob v. City of New York, 315 U.S. 752 (1942)..... 7

John Hopkins Univeristy v. Hutton, 422 F.2d 1124 (4th Cir. 1970) 7

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Kramas v. Security Gas & Oil Inc., 672 F.2d 766 (9th Cir. 1982) 4

Kubik v. Goldfield, 479 F.2d 472 (3d Cir. 1973) 7

Merrill Lynch Pierce Fenner & Smith v. Curran, 456 U.S. 353 (1982) 10

Prudential Oil Corp. v. Phillips Petroleum Co., 392 F.Supp. 1018 (S.D.N.Y. 1975) 7

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) 7

Robuck v. Dean Witter & Co., 649 F.2d 641 (9th Cir. 1980) 4

Ross v. Bernard, 396 U.S. 531 (1970) 8

Simler v. Conner, 372 U.S. 221 (1963) 7

State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) 7,8

United States v. Kubrick, 444 U.S. 111 (1979) 4

Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970) 5

Wood v. Carpenter, 101 U.S. 135 (1879) 3

STATUTES, RULES AND REGULATIONS

Securities Exchange Act of 1934
§ 10(b) 2,8,9
§ 18(c) 9

TABLE OF AUTHORITIES (Continued)

Page

STATUTES, RULES AND REGULATIONS (Continued)

National Labor Relations Act
29 U.S.C. § 160(b), § 10(b) 10

SECONDARY AUTHORITIES

5 C. Jacobs: *Litigation and Practice Under Rule 10b-5,*
§ 235.03 (2d ed. 1984) 5,9,10

No. 84-334

IN THE

Supreme Court of the United States

October Term, 1984

PEAT, MARWICK, MITCHELL & CO.,

Petitioner,

--against--

PETER MOSESIAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit (Petitioner's Appendix C-1) is reported at 727 F.2d 873. The Order of the District Court for the Southern District of California is printed at Petitioner's Appendix at page B-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix C at pp. 2-9).

ARGUMENT

This case presents no issues worthy of certiorari.

After a bifurcated trial limited to statute of limitations issues, the jury found that the statute did not bar the complaint. The district court, apparently disagreeing with the jury's fact-finding, granted a judgment notwithstanding the verdict, thus upholding the limitations defense. The Court of Appeal for the Ninth Circuit properly reversed, making a routine application of JNOV principles, determining simply that the district court erred in replacing the jury's verdict with its own.

The Ninth Circuit's routine application of limitations and JNOV principles certainly presents no occasion for a grant of *certiorari*. Similarly, there is no need for this Court to reconsider the long-established constitutional right to jury trial on factual issues presented by a limitations defense, or the well-settled principle that state statutes of limitations are to be borrowed in securities cases arising under § 10(b) of the Securities Exchange Act of 1934.

I.

THE NINTH CIRCUIT'S DECISION THAT THE STATUTE OF LIMITATIONS HAD NOT RUN ON THIS SHAREHOLDERS' CLASS ACTION WAS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR COURTS OF APPEAL

Peat, Marwick, Mitchell & Co's ("Peat") central contention in support of its Petition is that the Ninth Circuit departed from decisions of this Court and those of the Courts of Appeal concerning the running of the Statute of Limitations on a claim under Section 10b of the Securities Exchange Act of 1934 in this shareholders' class action. Only by characterizing the Ninth Circuit's opinion as standing for various principles which the Ninth Circuit did not adopt does Peat have any basis to claim that grounds for its Petition even exist.

However, contrary to Peat's assertion, the opinion below is entirely consistent with both this Court's decisions and those of other Courts of Appeal and provides no grounds for the use of this Court's extraordinary review power. Peat's primary reliance on *Wood v. Carpenter*, 101 U.S. 135 (1879) is misplaced. As this Court held there:

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

101 U.S. at 141.

To attempt to bring itself within the holding of *Wood*, Peat cites seven "red flag" events (primarily adverse business events) which it concludes must have triggered an earlier investigation by plaintiff into Peat's fraudulent conduct, as a matter of law. However, as the Ninth Circuit properly held, none of these events suggested the *cause* of the harm which forms the basis of plaintiff's complaint, Peat's improper accounting practices:

> Most of the red flag events make it obvious that the company was in a poor financial condition. Peat Marwick reported the losses in the 1972 financial statement. Financial problems, however, do not necessarily suggest accounting fraud. Sudden losses, the "going concern" qualification, a decline in stock price, suspension of trading, difficulty with creditors, and the resignation of top management may also be explained by financial mismanagement, cost overruns, general market conditions, or other events unrelated to *accounting fraud*. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d at 1310; *Admiralty Fund v. Jones*, 677 F.2d 1289, 1294 (9th Cir. 1982); *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1368 (9th Cir. 1978).

(Petitioner's App. at C-8)

Simply put, "notice" of the red flag events sufficient to "call for inquiry" would not have led plaintiff to the "fact" of Peat's wrongful conduct. Both the jury which heard the evidence and the Court of Appeals so found. This was a factual issue which the jury decided

favorably to plaintiff, and which the Court of Appeals properly held could not be overturned by a JNOV.

For the same reason, the Court of Appeals decision is consistent with *United States v. Kubrick*, 444 U.S. 111 (1979) also relied on by Peat. In *Kubrick*, it was undisputed that the plaintiff was aware of both the fact of his injury "and its probable cause," (*Id.* 444 U.S. at 118) more than two years prior to the filing of his suit under the Federal Tort Claims Act. As the Court noted:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt *and who has inflicted the injury*.

Id. 444 U.S. at 122 (emhasis added).

What distinguishes the present case from *Kubrick* is plaintiff's lack of knowledge of the *cause* of the injury, Peat's fraudulent accounting practices, a fact which did not become known until the publication of the Royal Inns Co-Trustees' report less than one month prior to the commencement of this action.

Nor is the Court of Appeals decision at odds with those of other Circuits. In the Ninth Circuit the standard for when a limitations period in a securities fraud action begins to run is the point at which the plaintiff has "knowledge of facts sufficient to make a reasonably prudent person suspicious of *fraud*. . . ." *Robuck v. Dean Witter & Co.*, 649 F.2d 641, 644 (9th Cir. 1980); *accord Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1309 (9th Cir. 1982) ("when the plaintiff discovered or could have discovered the *fraud* with the exercise of reasonable diligence . . ."); *Kramas v. Security Gas & Oil Inc.*, 672 F.2d 766, 770 (9th Cir. 1982) ("when . . . plaintiff discovered or should have discovered the *fraudulent conduct* . . .") (all emphasis added). It is the fact of "deception" which must be discovered. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397

(1946). Something must cause the plaintiff to suspect the *falsity* of prior representations. *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1367 (9th Cir. 1978).

Virtually every other Circuit Court has adopted and applies a similar test which focuses on the operative word "fraud" in terms of what must be discovered. *See e.g., Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978) ("when plaintiff . . . discovered or should have discovered the fraud of which he complains"); *Breen v. Centex Corp.*, 695 F.2d 907, 911 (5th Cir. 1983) ("when [plaintiffs] knew or . . .should have known of [the defendant's] alleged fraudulent conduct"); *Herm v. Stafford*, 663 F.2d 669, 682 (6th Cir. 1981) ("when 'the fraud is or should have been discovered'"); *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir. 1970) ("the date the fraud upon reasonable inquiry should have been discovered"); *accord* 5 C. Jacobs: *Litigation and Practice Under Rule 10b-5*, § 235.03 at 10-31 (2d ed. 1984) (the limitations period "begins to run when plaintiff knew or should have known of the fraud.").

In summary, the Court of Appeals correctly decided the issue, consistent with this Court's prior decisions and those of other Circuits on the statute of limitations and consistent with indisputable JNOV principles.

Peat's additional arguments that: (i) the Ninth Circuit decision protects only the guilty; (ii) that a statute of limitations can no longer run in "accounting fraud" cases; and (iii) that the decision below puts defendants charged with fraud to an election of defenses, borders on the specious and provides no basis for the issuance of a writ of certiorari. Peat's problem is of its own making, as it successfully insisted on a bifurcated trial, then improperly put in evidence of its supposed innocence, but now takes offense at the use of this evidence by plaintiff and the Court of Appeals in illustrating why a reasonable shareholder would not have suspected accounting fraud during the crucial time period. Only because of its abuse of the bifurcated proceedings is Peat able to argue that it has been abused by the Ninth Circuit's decision because it is innocent of any wrongdoing.

II.

PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE STATUTE OF LIMITATION ISSUE

Peat has consistently contended throughout these proceedings that, despite well-established constitutional decisions to the contrary, the plaintiff and the class should be deprived of a jury trial on the statute of limitations issue. Both the trial court and the Ninth Circuit disagreed. Those views need not and should not be disturbed here. Simply put, the issue before the District Court in the first phase of the trial was ". . . when a reasonably prudent investor would have discovered the alleged wrongdoing." (Petitioners Appendix C at C-4.) As the Ninth Circuit properly held:

> The question of what a reasonably prudent investor should have known is particularly suited to a jury determination. The jury could have reached various conclusions from the evidence. In our view, the one it reached was reasonable and is supported by substantial evidence. It was therefore inappropriate for the district court to grant Peat Marwick's motion for judgment notwithstanding the verdict.

(*Id.* at C-9.)

The decision below is in accord with the teachings of this Court and an unbroken line of precedent from other Circuits holding that the question of whether the plaintiff knew or should have known of the fraud at an earlier date is for the jury as the trier of fact to determine. As the Ninth Circuit explained in reversing a summary judgment in favor of defendants on the issue of plaintiffs' discovery of the fraud:

> Great as the burden may be upon a busy court, it is necessary to place before a fact-finder the conflicting recollections of facts and the conflicting inferences to be drawn from such facts in this case. *The conflicting assertions in this case about what a reasonable investor would have known presented issues of the type usually reserved for juries.* The trial court understandably sought to shorten the proceedings by summary judgment, but material questions of fact remained to be tried.

Briskin v. Ernst & Ernst, 589 F.2d 1363, 1369 (9th Cir. 1978) (emphasis added). Similarly, the Second Circuit has concluded "The question whether [plaintiff] exercised due diligence, and thus is not precluded by the statute of limitations from maintaining this action, is a question of fact that should be determined *by the jury* as the trier of the facts." *Robertson v. Seidman & Seidman*, 609 F.2d 583, 592-593 (2d Cir. 1979) (emphasis added). Finally, in language particularly applicable to the instant case, the Fourth Circuit has stated, "It is sufficient for us to say that when, as here, a jury has been demanded and the facts give rise to conflicting inferences on the issue of reasonable diligence, the question *must be submitted to the jury*." *John Hopkins University v. Hutton*, 422 F.2d 1124, 1131 (4th Cir. 1970) (emphasis added). *Accord, Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967) (reversing summary judgment); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1227 (10th Cir. 1970) (affirming judgment in favor of plaintiff entered after a jury verdict); *Kubik v. Goldfield*, 479 F.2d 472, 477 n. 12 (3d Cir. 1973) (dictum).

Moreover, given the intensely factual nature of the inquiry involved, this result is supported in both reason and law. The right to a civil jury trial has been jealously guarded by this Court:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935). The Court has continually reminded lower courts that "[t]he federal policy favoring jury trials is of historic and continuing strength." *Simler v. Conner*, 372 U.S. 221, 222 (1963); *see also Jacob v. City of New York*, 315 U.S. 752-753 (1942); *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959). It has urged federal courts to resolve close cases in favor of extending the right to trial by jury. *See Dixon v. Northwestern Nat. Bank*, 297 F.Supp. 485, 489 (D. Minn. 1969); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F.Supp. 1018, 1022 (S.D.N.Y. 1975).

In challenging this long-standing line of authority, Peat places primary emphasis on *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). In *Peterson*, the Tenth Circuit considered the propriety of a district court's decision to grant summary judgment to defendant based on its determination that

the plaintiff, the State of Ohio should have discovered the alleged fraud at an earlier date. Rather than applying the traditional summary judgment test -- *i.e.*, whether defendant demonstrated that no issues of material fact exist -- the court reviewed the history of the "reasonable discovery" rule, which it referred to as the federal "tolling" doctrine. Concluding that it was equitable in origin, the Tenth Circuit affirmed the district court's grant of summary judgment, reasoning that the equitable origin allowed the district court judge "some room for discretion." *Id.* at 693.

The *Peterson* court *did not state* that defendant's statute of limitations defense was an equitable issue and/or that a jury was an inappropriate trier of fact on such a defense. The court's holding explicitly limits its reach to the summary judgment procedure -- an issue twice resolved against defendants in the instant case in the District Court -- and specifically contemplated a *jury trial* if issues of fact had remained:

> Where, as here, a § 10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action. If the documents before the court are not sufficiently persuasive to meet this stringent test, *a jury ultimately deciding the facts will determine by a preponderance of the evidence whether the action accrued too remotely.*

Id. at 694 (emphasis added).

Simply put, Peat's 10b-5 statute of limitations defense, however derived, remains a *legal* defense to a *legal* claim created by federal law, unquestionably bringing it within the ambit of the Seventh Amendment's jury trial guarantee. The fact that one aspect of the defense as it applies to this case may have equitable origins is, perhaps, of historical interest, but cannot deprive plaintiffs of their constitutional right to trial by jury. *See Ross v. Bernard*, 396 U.S. 531, 539-541 (1970).

III.

THE NINTH CIRCUIT AND THE DISTRICT COURT APPLIED THE CORRECT LIMITATIONS PERIOD -- A PERIOD WHICH SHOULD BE CHANGED, IF AT ALL, BY CONGRESS

It has been established since the earliest private litigation under Section 10(b) of the Securities Exchange Act that the applicable statute of limitation is to be borrowed from the comparable state provision. Peat urges the Court to upset this unbroken line of precedent and apply the specifically inapplicable limitations period set forth in Section 18(c) of the 1934 Act -- one year from discovery with an outside limitations period of three years -- to all actions brought pursuant to Section 10b of the 1934 Act. But this is no reason to modify this body of law, and if it were, Congress would be the proper body to do so in legislation with prospective application only. *Stare decisis* alone is enough to demonstrate that Peat is wrong.

Although Peat couches its argument in pejorative terms such as "forum shopping," "securities speculations" and "tactical delay," the end result it seeks by the adoption of the rule it proposes is to prevent this action from reaching trial on the merits by imposing an absolute time bar with no tolling provisions whatsoever. That result is contrary to the teachings of the Court and the strong public policy in favor of private enforcement of the federal securities laws.

First, two recent landmark decisions by this Court, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) and *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) have noted without criticism the long standing practice of "borrowing" the analogous forum State statute of limitations to be used in actions brought under Section 10b. The practice has been followed virtually without exception by the lower courts. See, 5 C. Jacobs: *Litigation and Practice Under Rule 10b-5* § 235.02 (2d ed. 1984) and cases therein cited.

Second, Peat's reliance upon *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) is misplaced. The Court in *DelCostello* was presented with an undecided question, not one resolved by a host of prior, consistent decisions, and analyzed the public policy considerations supporting an employee's right to sue his or her employer for breach of a collective bargaining agreement or the union for mishandling a subsequent grievance/arbitration proceeding. The Court

held that the proper statute of limitations was the six month federal limitations period in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). However, it did so, in part, because it concluded that certain of the analogous state court statutes under consideration were *too short*:

> We conclude that state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine.

Id. ____ U.S. ____, 103 S.Ct. 2281, 2291 (1983).

Peat's implicit assumption that state limitations periods (with or without the application of doctrines of tolling), are *too long* is simply contrary to fact. Although Peat argues that the limitations periods range from as little as one to as long as ten years and that this fact encourages a host of undesirable results (Petitioners' Brief at 24), an analysis of these statistics is revealing. Of the approximately thirty-nine states in which District Courts have "borrowed" a settled limitations period, approximately twenty-nine of them have adopted a period of 3 years or less, providing no factual bases for the abuse Peat claims exists. See 5 C. Jacobs: *Litigation and Practice Under Rule 10b-5* § 235.02 at 10-20 -10-26 (2d ed. 1984).

Moreover, the recent teachings of the Court concerning the importance of enforcement of rights under the Federal Securities Laws seem to make it clear that these rights are better served by a longer limitations period, not a shorter one. *Herman & MacLean v. Huddleston*, 459 U.S. 386-387 ("we have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'"); *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 387 (1982) ("the private cause of action enhances the enforcement mechanism fostered by Congress . . . [which] evidenced an affirmative intent to preserve this enforcement tool."). The current borrowing practice is consistent with both the analysis of *DelCostello* and this Court's recognition of the importance of the enforcement of private rights under the Federal Securities Laws and should not be changed or limited as Peat suggests. Any such action, if action need be taken should be left to Congress. See 5 C. Jacobs: *Litigation and Practice Under Rule 10b-5* § 235.02 at 10-27 (2d ed. 1984) (suggesting

that changes in the limitations periods are inappropriate because of the reliance prospective litigants place on the old period).

IV.

CONCLUSION

For all of the above reasons, Peat's Petition should be denied.

Respectfully submitted,

MILBERG WEISS BERSHAD SPECTHRIE
& LERACH
WILLIAM S. LERACH
KEITH F. PARK
2000 Central Savings Tower
225 Broadway
San Diego, California 92101

MILBERG WEISS BERSHAD SPECTHRIE
& LERACH
MELVYN I. WEISS
One Pennsylvania Plaza
New York, New York 10119

Counsel for Respondent